APPENDIX A.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

JIMMY L. NORMAN, Plaintiff-Appellee, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant-Appellant. No. 81-5021.

Filed: November 24, 1982.

Appeal from the United States District Court for the Central District of California. Honorable Albert Lee Stephens, Jr., District Judge, Presiding. Argued and Submitted, July 7, 1982.

Before: ALARCON, POOLE and BOOCHEVER, Circuit Judges.

We affirm the verdict and judgment in favor of Jimmy Norman under the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*

The jury instructions correctly stated the law regarding the standard of causation applicable in actions under the FELA. *See Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957); Devitt & Blackmar, Federal Jury Practice and Instructions, Instruction 94.13 (3rd ed. 1977). Moreover, the causation instruction did not confuse the jury by failing to refer to "proximate" causation. In light of the instruction cautioning the jury that all the instructions were to be taken together, the jury could be expected to understand that the causation instruction given also included the principle of proximate causation in other instructions.

It was not error to overrule Southern Pacific's objection to a statement made during Norman's opening argument that the FELA was his sole remedy. There was some basis for the statement, *see Jess v. Great Northern Railway Co.*,

401 F.2d 535, 536 (9th Cir. 1968),[1] and any potential prejudice was cured by the court's immediate admonishment to the jury that the court alone would state the law.

Finally, the district court did not abuse its discretion in denying Southern Pacific's motion for a new trial. The damage award of $150,000 was not excessive. There were sufficient facts presented to justify the court's instruction for future pain and suffering and no objection was made to that instruction.

Southern Pacific's appeal was not frivolous and imposition of sanctions under Fed.R.App.P. 38 is not warranted.

AFFIRMED.

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[1]At oral argument, counsel for Southern Pacific contended that injured railroad workers have an alternate remedy under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231 *et seq*. This Act provides, as did its predecessor statute adopted in 1937, a system of retirement and disability benefits for persons who have worked in the railroad industry for ten or more years. *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 168 (1980). These benefits are analogous to social security benefits available to persons who work for nonrailroad employers, *see id.*, and do not constitute an alternative remedy for personal injuries suffered by employees as a result of their employer's negligence.

Order on Motion for Stay of Mandate.
(Rule 41(b) Fed.R.App.P.)

United States Court of Appeals for the Ninth Circuit.

JIMMY L. NORMAN, Plaintiff/Appellee, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, Defendant/Appellant. No. 81-5021. DC CV 79-1169 ALS.

Filed: December 20, 1982.

Upon due consideration of appellant motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before January 12, 1983.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

/s/ POOLE
United States Circuit Judge

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.